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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 353

KOHLER CO., *Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD

and

LOCAL 833, UAW-AFL-CIO INTERNATIONAL UNION, UNITED AUTOMOBILE, AIRCRAFT AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner, Kohler Co., prays that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the District of Columbia Circuit (Judge Miller dissenting) entered in the above entitled case on January 26, 1962, and on April 20, 1965. (This case results from the following cases in the Circuit Court of Appeals: *Local 833, UAW-AFL-CIO International Union, United Automobile, Air-*

craft and Agricultural Implement Workers of America, Petitioner v. *National Labor Relations Board, Respondent, Kohler Co., Intervenor,* No. 15,961; *National Labor Relations Board, Petitioner* v. *Kohler Co., Respondent,* No. 16,031; *Kohler Co., Petitioner* v. *National Labor Relations Board, Respondent,* No. 16,182; and *Kohler Co. Petitioner* v. *National Labor Relations Board, Respondent, Local 833, UAW-AFL-CIO International Union, United Automobile, Aircraft and Agricultural Implement Workers of America, Intervenor,* No. 18,961.)

CITATIONS TO OPINIONS BELOW

The January 26, 1962, decision of the Court of Appeals is reported in 300 F. 2d 699.[1] The April 20, 1965, decision is not yet officially reported but is reported in 58 LRRM 2847. It is printed in Appendix A hereto, infra p. 1a.

The original decision of the National Labor Relations Board is reported at 128 NLRB 1062 et seq. and printed in the Joint Appendix[2] at p. 8 et seq. The Board's supplemental decision is reported at 148 NLRB No. 147 and is reproduced at Supp. J.A. 2339 et seq.

JURISDICTION

The judgments of the Court of Appeals were entered on January 26, 1962, and April 20, 1965. The jurisdiction of this Court is invoked under 28 USCA 1254 (1).

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[1] It is also reproduced in the Supplemental Joint Appendix (hereinafter designated as "Supp. J.A.") at p. 2318 et seq.

[2] Hereinafter referred to as "J.A."

QUESTIONS PRESENTED

1. Did the National Labor Relations Board exceed its authority and the limitations imposed upon it by Section 10 (c) of the Act in holding that strikers discharged for coercive conduct proscribed by the Act were engaged in an unfair labor practice strike and are entitled to reinstatement with back pay; applying a policy of "balancing" the strikers' illegal conduct against the employer's conduct?

2. May a reviewing court, which has no power to substitute its judgment for that of the Board as to inferences to be drawn from the evidence, nevertheless conclude that the Board "improperly ignored the inferences to be drawn" from evidence which the Board considered and found was "amply refuted" by other evidence—and remand the case to the Board with directions to reweigh the evidence?

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended, (49 Stat. 449, 61 Stat. 136, 29 U.S.C. Sec. 151, et seq.) are set forth in Appendix B hereto.

STATEMENT OF THE CASE

This case involves the discharge of 57 strikers[3] for misconduct already passed upon by this Court. In *U.A.W.* v. *Wisconsin Employment Relations Board,* 351 U.S. 266, 270, this Court said—

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[3] 90 strikers were discharged for unlawful conduct during the strike. The Board did not proceed on 12. It still sustains the discharge of 17 and finds *de hors* the record, that "it now appears" that three others were deceased at the time of the Board's first decision. (Supp. J.A. 2368, n. 28)

> "It seems agreed, and we think correctly in view of the findings of fact, that the alleged conduct of the union in coercing employees in the exercise of their rights is a violation of § 8 (b) (1) of that Act."[4]

The decisions of the Board itself now establish that the strikers here involved were in fact guilty of the conduct found by this Court to be a violation of 8 (b) (1) of the Act and that the Union, through its strike committee, directed and controlled such activities.

The original Board decision found that these strikers did engage in or directed and controlled mass obstructive picketing having the purpose and effect of banning ingress to and egress from the plant,[5] or the "plainly coercive and intimidatory" home picketing,[6] and that this conduct was the reason for their discharge and not a pretext.[7] The Board's supplemental decision adopts these findings.[8]

By its supplemental decision the Board extends the protection of the Act to strikers found guilty of the following types of unlawful conduct:

(1) Mass "belly to back" picketing by "up to 2,500 pickets", having for its purpose the barring of ingress to and egress from the plant, including the maintenance of a "pass" system under which persons desiring to enter the plant were required to obtain a pass from the Union, which "from

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[4] The "Act" as referred to herein is the National Labor Relations Act as amended, 29 USC 151 et seq.

[5] 128 NLRB at 1103, 1105, 1107-1108; J.A. 66, 68, 69, 72, 73.

[6] 128 NLRB at 1106; J.A. 70.

[7] 128 NLRB at 1102, n. 63; J.A. 65, n. 63; J.A. 73.

[8] Supp. J.A. 2356.

April 5 until May 28, 1954, except for 3 days early in May" kept the plant "SHUT DOWN LIKE A DRUM",[9] and "halting, encircling, blocking, shouldering and bumping of non-strikers or job applicants."[10]

(2) "Plainly coercive and intimidatory" harassment of non-strikers and their families at their homes by "disgraceful spectacles of mob proportions" with "as many as 400, 500 and even 700 persons assembled", shouting "vile names, insults, derisive epithets, and even threats."[11]

(3) Organization and direction of such unlawful conduct by members of the Union's strike committee.[12]

Although the majority of the lower court and the Board concede that this misconduct was "unprotected action"[13] the Board now holds that this misconduct was not so flagrant as "to warrant depriving them of the protection of the Act.[14]

The Board's excuse for this anomalous result is its attempt to formulate and apply a new national labor policy, i.e., that proscribed conduct becomes protected if committed in connection with an unfair labor practice strike.

Thus this case also involves the question of the validity of the Board's prerequisite finding that the strike here involved was an unfair labor practice strike.

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[9] 128 NLRB at 1103-1104; J.A. 65-68.

[10] Supp. J.A. 2360.

[11] J.A. 70.

[12] Supp. J.A. 2356.

[13] 300 F. 2d at 703, Supp. J.A. 2322; Supp. J.A. 2356.

[14] Supp. J.A. 2361.

PROCEEDINGS BELOW

A. The Board's Original Decision

The original decision of the Board,[15]

(1) Held that Kohler Co. had not refused to bargain in good faith prior to the strike; that its positions on the bargaining demands of the Union "were supported by legitimate and, in the main, reasonable arguments";[16] and that the strike was "caused by the failure of the parties to reach a contract and was for economic reasons at its inception",[17] hence was not an unfair labor practice strike at its inception;

(2) Sustained the discharge of the strikers here involved.[18]

B. The Review and Remand

On petition for review the Court of Appeals for the District of Columbia Circuit (Judge Miller dissenting) sustained those portions of the Board's decision adverse to Kohler Co. and remanded those portions of the decision favorable to Kohler Co., including the discharges here involved.[19]

The majority of the Court of Appeals held that the Board should have applied what it termed the "Thayer doctrine"[20] and "balanced" the discharged strikers' misconduct against employer unfair labor practices.

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[15] 128 NLRB 1062 et seq.; J.A. 8 et seq.

[16] 128 NLRB at 1068; J.A. 19.

[17] 128 NLRB at 1077; J.A. 30.

[18] 128 NLRB at 1103-1105, 1108; J.A. 66-69, 71.

[19] 300 F. 2d 699 et seq.; Supp. J.A. 2318 et seq.

[20] *N.L.R.B.* v. *Thayer*, 213 F. 2d 748 (1st Cir.), certiorari denied 348 U.S. 883.

The majority opinion recognized that in the case of most of the discharges no such "balancing" was possible under the Board's original decision. The misconduct for which most of the strikers had been discharged had occurred prior to the date when the Board found that the strike became an unfair labor practice strike[21] and therefore could not have been "provoked" by any later unfair labor practice. Accordingly, the majority clearly implied that the Board reverse its previous finding and find unfair labor practices antedating the misconduct as a prerequisite to the reinstatement of strikers guilty of illegal conduct.[22]

The majority found that the Board had "improperly ignored the inferences to be drawn from Kohler's pre-1953 labor relations history"[23] They ignored the fact that the Board, in its original decision, stated unequivocally: "In reaching this conclusion the Board is not unmindful of the background evidence" and observed that "Standing alone, the foregoing evidence could well lead to a finding . . . that the Respondent was opposed to bargaining with any but a dominated union . . ."; but found that ". . . such evidence is amply refuted by the undisputed facts concerning the negotiations and the results of the collective bargaining during 1952 and 1953."[24]

It is clear, from the express language of the Board's decision, that it did not "ignore" the pre-1953 labor relations history, or view the 1954 negotiations "in

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[21] 300 F. 2d at 702, n. 6; Supp. J.A. 2320, n. 6.

[22] 300 F. 2d at 703-704; Supp. J.A. 2323-2324, 2342.

[23] 300 F. 2d at 706; Supp. J.A. 2328.

[24] 128 NLRB at 1065; J.A. 12-13.

isolation",[25] but on the contrary followed the statutory mandate to base its findings "on the record considered as a whole".[26]

That the Board's original decision did not ignore the "pre-1953" labor relations history is further made clear from the dissent of Member Jenkins to the original decision.[27] The Board, in its original decision, cannot be considered to have ignored evidence upon which a vigorous dissent was based.

Member Leedom's dissent to the supplemental decision[28] also makes clear that this evidence was not ignored.

It is obvious that the statement in the Court's majority opinion that the Board "ignored" the "pre-1953" history means simply that the majority of the Court would have drawn a different inference from that evidence than that which the Board did draw.[29]

This case poses squarely the question of whether the rule that a reviewing court may not ". . . displace the Board's choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo*",[30] may be nullified by the device of stating that

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[25] 300 F. 2d at 706; Supp. J.A. 2328.

[26] Act, Sec. 10(e); 29 USC 160 (e).

[27] 128 NLRB at 1115 et seq.; J.A. 83 et seq.

[28] Supp. J.A. 2374.

[29] Judge Miller, dissenting, found the grounds upon which the Board's original decision found the strike converted to an unfair labor practice strike on June 1, 1954, "rather farfetched, indeed without foundation in reason". (300 F. 2d at 707, 711; Supp. J.A. 2331-2338)

[30] *Universal Camera Corp.* v. *N.L.R.B.*, 340 U.S. 474, 488.

the Board "ignored" the evidence upon which the reviewing court would have reached a different conclusion and by remanding the case with implied instructions to draw a different inference from that evidence.

We submit that a court may not recognize this rule when the Board's decision is adverse to an employer and ignore it when the decision is in favor of the employer.

The further question is raised as to whether a reviewing court may remand with implied instructions that the Board ignore evidence which "fairly detracts" from the weight of the "background evidence." [31]

The original Board found that the *foreground* evidence of the *actual negotiations* "amply refuted" the inference which the majority of the court drew from the "background" evidence.

In this case it was the Board (in its original and undirected decision) rather than the majority of the Court that obeyed the statutory mandate to consider the record as a whole.

The Board did not "ignore" but fully considered the Company's pre-strike labor relations history. In accordance with the statutory command it weighed that history in the light of the undenied facts that—

(1) The "pre-1953 labor relations history" found "amply refuted" by the original Board but now relied upon by the majority of the Court and the Board is ancient history, extending as far back as 1933.[32] Subsequent thereto, in 1953,

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[31] Id.

[32] Supp. J.A. 2343.

Kohler Co. made a contract with this Union, a contract which the Union hailed as a "good" one, and one "we accept with pride."[33]

(2) The parties negotiated to agreement on a subsequent and further wage increase under the wage reopening provision of that contract.[34]

(3) Kohler Co. at all times during the 1954 negotiations had on the table a complete contract proposal which it was ready and willing to sign as a contract,[35] and, after February 25, 1954, also had an alternative proposal to extend the former contract, including the quarterly wage reopening provision, without change.[36]

Therefore, any finding to the effect that Kohler Co. was refusing to enter into a contract is "amply refuted" by "undisputed facts".

The majority of the Court of Appeals further held that the Board was not precluded by Section 10 (c) of the Act from ordering the reinstatement of strikers guilty of misconduct (as the Board's own brief correctly argued)[37] and stated "But in its decision the Board did not mention the 'for cause' provision of Section 10 (c)."[38]

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[33] 128 NLRB at 1066; J.A. 14.

[34] 128 NLRB at 1066; J.A. 14.

[35] 128 NLRB at 1067; J.A. 15.

[36] 128 NLRB at 1067; J.A. 16.

[37] 300 F. 2d at 704; Supp. J.A. 2325.

[38] 300 F. 2d at 705; Supp. J.A. 2326.

Again the majority ignores the *express language* of the Board's decision, which stated "... all Board members agree that the Respondent did have sufficient cause for discharging ... members of the strike committee."[39]

It baffles the imagination to conceive of a situation where the employer has "sufficient cause" for discharge[40] and yet a discharge for that reason would not be "for cause" under Section 10 (c).

The decision of the majority of the court below seems to be based on the proposition that a Board decision may not be considered to have been founded on the provisions of a statute unless it specifically refers to the statute by *section number,* even though the Board makes the *factual finding* which gives the statute application and couches its finding in the *language of the statute.*

We submit that this is untenable. A reviewing court has no more authority to make a *de novo* finding on the facts giving application to Section 10 (c) than to displace any other factual finding of the Board supported by substantial evidence.

The Board also found that Kohler Co. had "a valid ground" for discharging those who participated in the so-called "home demonstrations".[41]

Certainly a discharge for a "valid ground" or for "sufficient cause" is a discharge "for cause" within the meaning of Section 10 (c).

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[39] 128 NLRB at 1105; J.A. 69.

[40] 128 NLRB at 1102, n. 63; J.A. 65, n. 63.

[41] 128 NLRB at 1106; J.A. 71.

C. Prior Petition for Certiorari

Kohler Co. petitioned this Court for a writ of certiorari to review the above decision.

Both the Board and the Union opposed the petition on the ground that the petition was premature since the court below had not yet entered a final order but had remanded the case to the Board.[42]

This Court denied certiorari.[43]

A final order has now been entered by the court below and the case is now ripe for review by certiorari.

D. The Board's Supplemental Decision

The supplemental decision of the Board[44] demonstrates that it construed the remand of the Court as instructions to reverse its prior finding that the strike was not an unfair labor practice strike at its inception, and to use such reversal as a basis for ordering reinstatement of strikers discharged for illegal conduct.

The Board said: "However, the Court concluded, in effect, that the grounds on which the Board had found, the strike was not an unfair labor practice strike at its inception were inadequate."[45]

Member Fanning, in his concurring opinion,[46] construed the remand as a direction to the Board "to reconsider its decision" and to "re-evaluate Respondent's

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[42] Board Brief in Opposition, pp. 15, 20-21; Union Brief in Opposition, pp. 2, 18, 19.

[43] 370 U.S. 911.

[44] Supp. J.A. 2339 et seq.

[45] Supp. J.A. 2341.

[46] Supp. J.A. 2372.

conduct" and stated: "I have reconsidered my earlier decision in accordance with the Court's instruction . . ."

This poses the question of the authority of a reviewing court to find the Board's conclusions on conflicting evidence inadequate", despite the fact that substantial and undenied evidence supports the Board's conclusion.

The nature of the Board's "reconsideration" and its concept of the implied instructions of the Court of Appeals are clearly shown by the statement in the concurring opinion of Member Fanning:

> "These conclusions are inescapable if Respondent's conduct during those negotiations be viewed as the conduct of an employer opposed to bargaining with any but a dominated union . . ."

It is clear that the Board interpreted the remand to require it to start its "reconsideration" by *assuming* that the Company was opposed to bargaining (thus predetermining the Company's guilt) and to cull from the record only those items which gave superficial support to that predetermined conclusion.

On remand, the new Board ignored the "undisputed facts" of the *actual negotiations* found by the former Board and which the former Board held "amply refuted" the conclusions the Board now draws.[47]

Following its interpretation of the remand, the Board:

(1) Reversed the ruling of the prior Board sustaining the discharge of 77 strikers for misconduct and ordered 57 of them reinstated with back pay, and

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[47] 128 NLRB at 1065; J.A. 13.

(2) Grounded such reversal upon its reversal of the decision of the prior Board and its new finding that the strike was an unfair labor practice strike at its inception.

E. Petition for Review of Board's Supplemental Decision

On petition for review of the Board's supplemental decision the Court of Appeals (Judge Miller again dissenting) held that the Board had "properly applied the principles announced in our initial decision."[48]

Thus this case raises squarely the question whether a reviewing court has authority to remand a case for "further consideration" and to impliedly instruct the Board, upon such "further consideration" to draw the inferences from the evidence that the Court would have drawn had the case been before it *de novo*.

THE IMPORTANCE OF THE CASE

1. This case is the first instance of judicial approval of:

(a) Mass obstructive picketing having the purpose and effect of preventing ingress to and egress from a plant;

(b) Coercive and intimidatory harassment of non-strikers at their homes;

(c) The direction and control of such conduct by union officials. Such illegal conduct has previously been condemned—not ratified.[49]

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[48] App. A, p. 38.

[49] *N.L.R.B.* v. *Thayer Co.*, 213 F. 2d 748 (1st Cir.), cited by the majority of the court below as authority for a "Thayer doctrine" leading to such result did not approve or ratify such illegal conduct. There was no obstructive picketing in Thayer, ". . . non-striking

We submit that this novel approval of conduct specifically proscribed by the Act, warrants the review of this Court.

2. The effect of the majority decision below is to direct the Board to reverse a policy which it has followed consistently before and since the *Thayer* decision.

On remand in *Thayer* the Board,[50] while accepting the decision as "the law of this case", made it clear that it was not thereby agreeing with "an analytical

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employees were able to enter and leave the plants without serious incident." (213 F. 2d at 751) and "It is undisputed that those employees who wished to continue working during the strike were able to do so." (213 F. 2d at.756)

In the instant case the Kohler Co. plant was "shut down like a drum" by mass picketing. (128 NLRB at 1103; J.A. 65)

In Thayer "visits" to the homes of non-strikers (much less coercive and intimidatory in numbers and conduct than the "home demonstrations" involved here) were held to be "coercive in nature and calculated to instill fear of physical harm in the non-striker victims" (213 F. 2d at 757) and the participants were denied reinstatement. (*H. N. Thayer Co.*, 115 NLRB 1591 at 1593-1595, 1596)

The language of the Thayer decision must be read in the light of the facts of that case (*Armour* v. *Wantock*, 323 U.S. 126, 132-133) and any "Thayer doctrine" derived therefrom must be consistent with the facts passed upon in that case and the results of that decision.

In his dissent Judge Miller disagreed with the majority interpretation of Thayer and found no such "Thayer doctrine" as applied by the majority. On the contrary, he read Thayer as a "clear statement" that "if there was cause for discharge, the Board could not reinstate". (300 F. 2d at 710-711; Supp. J.A. 2337-2338)

As we show later, other courts of appeals agree with Judge Miller's construction of Thayer and have not interpreted that case to prescribe any such "Thayer doctrine" as applied here.

[50] *H. N. Thayer Co.*, 115 NLRB 1591, 1595.

distinction drawn by the Court in construing the Act, which distinction the Court itself termed 'subtlety'." [51]

The majority opinion of the Court of Appeals in the instant case noted that the Board in its action on the *Thayer* remand had expressed its intention not to follow this *Thayer* dictum and directed the Board to reverse this position.[52]

We submit that this reversal of long standing and correct construction of the Act warrants the review of this Court.

3. The practical *effect* of this decision cannot be disregarded. It *encourages* the very conduct which Congress has expressly *proscribed* in Section 8 (b) (1) and (7) of the Act.

The Board's supplemental decision recognized that the effect of an order of reinstatement is to encourage the misconduct thus ratified.[53]

If this decision is sustained, unions would have every right to advise strikers that they now have a license to engage in illegal conduct whenever the union can claim that an employer has committed an unfair labor practice.

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[51] The Thayer court (213 F. 2d at 753, n. 8) based this "analytical distinction" on a statement by Professor Cox that "The distinction was overlooked by the House Managers in reporting the Conference Agreement on the Labor-Management Relations Act 1947."

A "subtlety" concededly "overlooked" by Congress affords no proper basis for construing the intent of Congress. "Labor relations are practical matters. They are not finespun legalistic theories." *Lummus Company* v. *N.L.R.B.*, 339 F. 2d 728, 734 (D.C. Cir.)

[52] 300 F. 2d at 703, n. 15; Supp. J.A. 2323, n. 15.

[53] Supp. J.A. 2366.

This decision, which encourages the very conduct that it was the intent of Congress to eliminate, is of obvious importance to the administration of the Act, and, we submit, warrants the review of this Court.

4. It is a novel and dangerous doctrine that illegal violence, coercion and intimidation can be ratified and rewarded with back pay on the ground that it is in retaliation against the conduct of someone else.

This is particularly true when the law provides an adequate legal remedy for any violation by an employer.

The decision in this case establishes "an eye for an eye and a tooth for a tooth" as the law of labor relations.

Such a reversal of the manifest intent of Congress to substitute legal processes for the law of the jungle in labor relations warrants the review of this Court.

5. The limits of permissible review of a Board decision were established by this Court in *Universal Camera Corp.* v. *N.L.R.B.*, 340 U.S. 474, 488 and *N.L.R.B.* v. *Walton Mfg. Co.*, 369 U.S. 404.

Following these decisions courts of appeals have uniformly held that they have no power to displace the Board's choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo*. The appraisal of the weight of the evidence and the choice between inferences which may be drawn from facts open to conflicting inferences are for the Board and are not subject to review. Courts may not substitute their judgment for that of the Board. If there

is substantial evidence on the record as a whole to support the order of the Board it must be enforced.[54]

If the present decision is sustained, a device has been found whereby these thoroughly established rules may be nullified. Reviewing courts may, in practical effect, substitute their judgment for that of the Board, by directing reconsideration and reweighing of the same evidence with implied directions to draw different inferences therefrom.

CONFLICT WITH THE ACT, WITH DECISIONS OF THIS COURT AND WITH OTHER COURTS OF APPEALS

A. Conflicts as to Findings Re Discharges

(1) Conflict with the Act

The decision in this case reverses the national policy laid down by Section 8 (b) (1) (A) of the Act, which specifically outlaws restraint or coercion of employees in the exercise of their rights under Section 7 of the Act, and outlaws such conduct *without exception.*

The Act has been perverted into a *protection* of that which it *specifically prohibits.*

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[54] *United Furniture Workers, etc.* v. *N.L.R.B.*, 336 F. 2d 738, 742 (D.C. Cir.)
N.L.R.B. v. *Kobritz*, 193 F. 2d 8, 9, 10 (1st Cir.)
N.L.R.B. v. *Syracuse Color Press*, 209 F. 2d 596, 599 (2d Cir.), *cert. denied*, 347 U.S. 966
N.L.R.B. v. *Jarka Corp.*, 198 F. 2d 618, 620 (3d Cir.)
N.L.R.B. v. *Southland Mfg. Co.*, 201 F. 2d 244, 245 (4th Cir.)
N.L.R.B. v. *Insulating Fabricators*, 338 F. 2d 1002 (5th Cir.)
N.L.R.B. v. *Superex Drugs, Inc.*, 341 F. 2d 747, 749 (6th Cir.)
Saginaw Furniture Shops v. *N.L.R.B.*, 343 F. 2d 515, 517 (7th Cir.)
N.L.R.B. v. *Southern Transport, Inc.*, 343 F. 2d 558, 560 (8th Cir.)
N.L.R.B. v. *Laundry Drivers' Local*, 262 F. 2d 617, 619 (9th Cir.)
N.L.R.B. v. *Beatrice Foods Co.*, 185 F. 2d 726, 727 (10th Cir.)

(2) Conflict with This Court

The decision is in irreconciliable conflict with *N.L.R.B.* v. *Fansteel Metallurgical Corp.*, 306 U.S. 240.

The *Fansteel* case involved an unfair labor practice strike. In that case this Court emphatically rejected the very excuse now relied upon for extending the protection of the Act to illegal conduct, i.e., that the strike was an unfair labor practice saying:

> "To justify such conduct because of the existence of a labor dispute or of an *unfair labor practice* would be to put a premium on resort to force instead of legal remedies and to subvert the principles of law and order which lie at the foundations of society." (emphasis supplied) (306 U.S. at 254)

(3) Conflict with Other Circuits

The decision is likewise in conflict with the decisions of courts of appeals for at least three other circuits.

In *N.L.R.B.* v. *Clearfield Cheese Co.*, 213 F. 2d 70 (3d Cir.) the court sustained the Board's finding that the strike was an unfair labor practice strike,[55] but held that mass picketing which "physically barred all entrances to the plant" was "directly opposed to the force and violence prohibition of the Act" and that the "reinstatement rights" of strikers who engaged therein "were forfeited".[56]

Likewise in *N.L.R.B.* v. *Longview Furniture Co.*, 206 F. 2d 274 (4th Cir.), also an unfair labor practice strike,[57] the court refused to enforce a Board order

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[55] (Refusal to bargain) (213 F. 2d at 74).

[56] 213 F. 2d at 75.

[57] See *Longview Furniture Co.*, 100 NLRB 301, 304.

which required the reinstatement of strikers guilty of "vulgar, profane and intimidating language towards other employees in an effort to intimidate them" (at p. 275).

Similarly the seventh circuit in *W. T. Rawleigh Co. v. N.L.R.B.*, 190 F. 2d 832, also an unfair labor practice strike,[58] a Board order directing reinstatement and back pay to employees guilty of mass obstructive picketing was vacated by the court.

(4) Conflicting Interpretations of the Thayer Case

The sole basis for the decision of the majority of the court below is its interpretation of the *Thayer* case (213 F. 2d 748) in direct conflict with the interpretation of *Thayer* by the courts of appeals for at least two other circuits.

In *N.L.R.B.* v. *Ford Radio & Mica Corp.*, 258 F. 2d 457, 464 (2d Cir.), the court interpreted *Thayer* as holding:

> "If it was not a protected activity, then it is axiomatic that the employer, regardless of its motivation, may discharge the strikers and the Board is powerless to order reinstatement."[59]

In the recent case of *N.L.R.B.* v. *Blades*,[60] (8th Cir.), the court cites *Thayer* as supporting the principle that:

> "This section [10 (c)] gives the Board affirmative, remedial power only when an unfair labor practice

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[58] 190 F. 2d at 834.

[59] The Board's supplemental decision in the instant case designates the misconduct of the discharged strikers as "unprotected activities". (Supp. J.A. 2356)

[60] Not yet reported in Federal Reporter system. Reported at 59 LRRM 2210, 51 LC ¶ 19,698, pp. 33, 74.

> has been committed by authorizing its rectification through reinstatement of the affected employees *who have not otherwise been discharged for cause.*" (emphasis supplied)

Thus the appellate courts for the Second and Eighth Circuits, like Judge Miller in his dissenting opinion, construe *Thayer* as a "clear statement that if there was cause for discharge, the Board could not reinstate." (Supp. J.A. 2337)

(5) Conflict in the Decisions of the D. C. Circuit

Finally, the decision of the Court below is in direct conflict with its own prior decision.

In *International Ladies G.W.U.* v. *N.L.R.B.*, 237 F. 2d 545 (D.C. Cir.), a case which involved an unfair labor practice strike,[61] this same Court (both of the majority judges in the instant case participating) held:

> "We agree that the Board has no authority to *compel reinstatement* of employees who directly or indirectly participate in, authorize, or ratify misconduct." (237 F. 2d at 550) (emphasis in original)

In its decision in the instant case the same Court holds that it has the authority to direct the Board to exercise an authority which it has previously declared that the Board does not have.

B. Conflicts as to Finding of Refusal to Bargain

Since the decisions of this Court in *American Insurance Co.* v. *N.L.R.B.*, 343 U.S. 395, 404, and *N.L.R.B.* v. *Insurance Agents Int'l Union*, 361 U.S. 477, 486, it has

[61] 237 F. 2d at 547.

been well established that Section 8 (d) of the Act does not permit the Board to prescribe the substantive terms of a contract under the guise of a finding of lack of good faith bargaining. Failure to agree to a particular contract, contract provision or union economic demands is not a violation of the duty to bargain. An employer can be found guilty of refusal to bargain only if he is unwilling to agree to *any* contract, even on terms acceptable to him.

This decision, finding Kohler Co. guilty of refusal to bargain, is in clear conflict with this well established law. It ignores the undenied facts that:

(1) The Company made a contract with the Union, which the Union characterized as a "good" one and one "we accept with pride".

(2) That upon the expiration of that contract the Company offered to renew the contract without change.

(3) That the Company made an alternative offer of a new contract, including a wage increase, and was at all times willing to execute such a contract or to renew the former contract.

(4) That the Company never refused to negotiate but on the contrary supported its bargaining positions "by legitimate and, in the main, reasonable arguments".[62]

(5) That the Union publicly stated its reasons for striking and continuing on strike as:

Seniority
Arbitration

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[62] 128 NLRB at 1069; J.A. 19.

Automatic Wage Progression
Pension
Insurance
Union Security
Wages and Inequities[63]

all subjects of mandatory bargaining on which the Company was not required to agree to any specific proposal.[64]

The Union *never* stated that it was striking for any of the causes now found by the Board as reasons for the strike.

The Board exceeds its authority as defined in the Act and the decisions of this Court when it:

(1) Finds that the Company was refusing to bargain when it was at all times offering to make a contract;

(2) Ignores the reasons understood by both parties to have caused the strike and finds the strike caused and continued for *entirely different reasons*—a casual relationship never stated or perceived by *either* party to the negotiations.

An employer cannot be placed in the position of having to guess at his peril the purpose behind a strike nor be held guilty of refusal to bargain because he was subsequently outguessed by the trial examiner in divining the true purpose behind a strike. ***N.L.R.B.*** v. ***Ford***

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[63] J.A. 2203-2205.

[64] As Judge Miller in his dissent observed, the original Board found the strike caused "by a disagreement over contract terms" (300 F. 2d at 711; Supp. J.A. 2338). This disagreement continued throughout the strike and continued to be the cause of the strike.

Radio & Mica Corp., 258 F. 2d 457, 464 (2d Cir.). *A fortiori* the Board cannot find that the cause of a strike was a reason not stated or understood by *either* of the parties.

REASONS FOR GRANTING THE WRIT

A. Salient Undeniable Facts

The following salient facts are undenied and undeniable on this record.

1. The discharged strikers here involved were, in fact, guilty of the misconduct which was the reason for their discharge.

2. This conduct was not merely "unprotected", it was conduct expressly *proscribed* by Sections 8 (b) (1) and 7 of the Act.

This case does not involve the question of the Board's authority to compel reinstatement of strikers guilty of conduct which is merely "unprotected".

It involves the question of the Board's authority to compel the reinstatement of strikers concededly guilty of conduct *proscribed* by the Act.

3. The Act provides an adequate legal remedy for any unfair labor practice by an employer.

The strikers here involved deliberately eschewed such legal remedy and elected instead to engage in illegal conduct, subsequently claimed to have been in reprisal for alleged employer unfair labor practices.

It was not until after the Union's attempts to enforce its demands (none of which related to the later alleged unfair labor practices) by illegal conduct had been

restrained by action of the state authorities,[65] that it *even filed charges* to invoke the legal processes provided by the Act.

Thus this case raises squarely the question as to the Board's authority to declare strikers to be the only class of society authorized to ignore available legal remedies and take the law into their own hands by engaging in illegal conduct allegedly in reprisal for the conduct of someone else.

B. The Board Has No Authority To Establish National Labor Policy—It May Not Do So Even at the Direction of a Court of Appeals

In the recent case of *American Shipbuilding Corp.* v. *N.L.R.B.*, (March 29, 1965—No. 255, Oct. Term 1964, 85 S. Ct. 955, 966), this Court held:

> "However, we think that the Board construes its functions too expansively when it claims general authority to define national labor policy by balancing the competing interests of labor and management."

In its concurrent decision in *N.L.R.B.* v. *Brown*, (March 29, 1965—No. 7. Oct. Term 1964, 85 S. Ct. 980, 988), this Court held:

> "Reviewing courts are not obliged to stand aside and rubber stamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute. Not only is such review always properly within the judicial province, but courts would abdicate their responsibility if they did not fully review such administrative decisions. Of course due deference is to be

[65] Cf. *U.A.W.* v. *W.E.R.B.*, 351 U.S. 266.

> rendered to agency determinations of fact, so long as there is substantial evidence to be found in the record as a whole. But where, as here, the review is not of a question of fact, but of a judgment as to the proper balance to be struck between conflicting interest, 'the deference owed to an expert tribunal cannot be allowed to slip into a judicial inertia which results in the unauthorized assumption by an agency of major policy decisions properly made by Congress.' (citing *American Shipbuilding Corp. v. N.L.R.B., supra*)
>
> Courts must, of course, set aside Board decisions which rest on 'an erroneous legal foundation'."

This Court has made it clear that major policy decisions in the labor relations field are for Congress—not for the Board.

The rule of the *American Shipbuilding* and *Brown* cases applies *a fortiori* here.

In those cases the Board exceeded its authority by attempting to prescribe a national labor relations policy which Congress had not prescribed.

In the instant case it goes still further and assumes authority to create a *major exception* to the policy which Congress *has* prescribed, and to virtually repeal that policy.

In Section 8 (b) (1) of the Act Congress expressly and *without exception* proscribed coercion or restraint of employees in the exercise of the rights guaranteed in Section 7 of the Act.

Moreover, Congress, in defining the national labor relations policy, expressly declared that:

> "The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed." (Act, Section 1, 29 USCA 151)

Congress said, in effect, "This conduct is unlawful."

The decisions of the Board and of the lower court in this case say, in effect, "This conduct is lawful if it is provoked."

The Board has not authority to so emasculate the plain mandate of Congress—nor does a court of appeals have authority to direct it to do so.

The exception which the Board's decision herein creates swallows the rule which Congress had laid down.

The review we seek here is, like that in the *Brown* case (*supra*), not of a question of fact. The Board found, and still does not deny, that these strikers were guilty of the unlawful conduct for which they were discharged. The question is one of law and national labor relations policy.

C. The Board's Decision Does Not Effectuate But Defeats the Policies of the Act

The Board's authority to order affirmative action, such as reinstatement and back pay, is limited to such "as will effectuate the policies of this Act." (Act, Section 10 (c), 29 USCA 160 (c))

The Board is not the absolute judge of what will effectuate the policies of the Act.

The decision of the Board herein clearly defeats the policies of the Act.

As this Court held in *N.L.R.B.* v. *Fansteel Metallurgical Corp.*, 306 U.S. 240, 258:

> "We are of the opinion that to provide for the reinstatement or re-employment of employees guilty of the acts which the Board finds to have

> been committed in this instance would not only not effectuate any policy of the Act but would directly tend to make abortive its plan for peaceable procedure."

Following the rule laid down in *Fansteel*, the Seventh Circuit in *N.L.R.B.* v. *Indiana Desk Co.*, 149 F. 2d 987, 995, stated:

> "To hold that the striking employees in this case are entitled to be reinstated, some of them with back pay, is to put a premium on their misconduct and to encourage like conduct on the part of others. How such action can effectuate the policies of the Act is beyond our comprehension."

The Board itself concedes that an order of reinstatement encourages the misconduct thus condoned. In its supplemental decision herein it recognizes:

> "... the encouragement such misconduct would receive, with the possible disorder and instability which such encouragement might induce in collective bargaining, were we to order them reinstated." (Supp. J.A. 2366)

The effects of the decision of the Board herein are already apparent.

In a case subsequent to and based upon the Board's decision herein, *Oneita Knitting Mills, Inc.*, a case also involving the reinstatement of strikers discharged for misconduct, the Board adopted in toto the interpretation by its trial examiner of the decision herein:

> "While the net result of this may be that anything short of aggravated assault will not disqualify such a striker, this policy is deemed binding upon the undersigned." (153 NLRB No. 4, June 17, 1965, Trial Examiner's Decision, p. 9)

The Board's decision in the instant case gives the green light to all illegal conduct except perhaps that amounting to "aggravated assault".

What Congress has declared illegal and necessary to eliminate and to effectuate the policies of the Act the Board now holds to be permissible.

The Board now makes the specious argument that such a reversal of the declared policy of Congress is necessary on the ground that not to reinstate these employees "would be to permit the Respondent to take advantage of its own wrongdoing."[66]

This argument embodies two obvious fallacies:

(1) The Act provides adequate sanctions to prevent an employer benefiting from an unfair labor practice. An employee who loses his job *because* of an unfair labor practice is entitled to reinstatement. An employee who strikes in protest against an unfair labor practice retains reinstatement rights. This is adequate assurance that the employer will not profit from his own wrong.

There is no excuse for extending the mantle of the Act's protection to cover one who deliberately chose to ignore the legal processes provided by law and engaged in illegal acts.

The Board's reinstatement order here allows the *strikers* to benefit from their own wrong.

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[66] Supp. J.A. 2359.

(2) The strikers here involved did not lose their jobs because of any unfair labor practice of Kohler Co.[67]

They were discharged *because of their own illegal conduct.*

No striker lost his job because he went on strike to protest any Company action.

The strikers here involved lost their jobs *solely and only* because of *their own illegal and coercive acts.*

The Board completely ignores the lack of *causal relationship* between the alleged unfair labor practice and the illegal conduct which was the cause for discharge.

The order of reinstatement allows these strikers to benefit from their own wrongful and illegal conduct.

D. The Board Exceeded Its Authority in Ordering the Reinstatement of Individuals Discharged for Cause

Section 10 (c) of the Act provides, in pertinent part:

"No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause." (29 USCA 160 (c))

The legislative history makes clear that unlawful conduct is cause for discharge under 10 (c).

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[67] The argument that the illegal conduct of these strikers was only a pretext for their discharge was made and rejected by the original Board (128 NLRB at 1102, n. 63; J.A. 65, n. 63), a finding accepted by the succeeding Board (Supp. J.A. 2356).

The following language, from the *House Conference Report,* is pertinent:

> "For example, in the declaration of policy to the amended National Labor Relations Act adopted by the conference committee, it is stated in the new paragraph dealing with improper practices of labor organizations, their officers and members, that the 'elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed'. This in and of itself demonstrates a clear intention that these undesirable concerted activities are not to have any protection under the act, and to the extent that the Board in the past has accorded protection to such activities, the conference agreement makes such protection no longer possible. Furthermore, in Section 10 (c) of the amended act, as proposed in the conference agreement, it is specifically provided that no order of the Board shall require the reinstatement of any individual or the payment to him of any back pay if such individual was suspended or discharged for cause, and this, of course, applies with equal force whether or not the acts constituting the cause for discharge were committed in connection with a concerted activity." *House Conference Report* No. 510 on H.R. 3020, p. 39, Legislative History of the Labor-Management Relations Act 1947, p. 543.

and:

> "Taken in conjunction with the provisions of section 8 (b) (1) of the conference agreement . . ., wherein it is made an unfair labor practice for a labor organization or its agents to restrain or coerce employees in the exercise of rights guaranteed in section 7, it is apparent that many forms and varieties of concerted activities which the Board, particularly in its early days, regarded as protected by the act will no longer be treated as having

> that protection, since obviously persons who *engage in or support unfair labor practices will not enjoy immunity under the act.*" (emphasis supplied) *House Conference Report* No. 510 on H.R. 3020, p. 40, Legislative History of the Labor-Management Relations Act 1947, p. 544.

and:

> "As previously stated, employees are subject to the provisions of section 8 (b) only when they act as agents of representatives, but in these and other cases, *when they are disciplined or discharged for engaging in or supporting* unfair practices, *they do not have immunity* under section 7." (emphasis supplied) *House Conference Report* No. 510 on H.R. 3020, p. 54, Legislative History of the Labor-Management Relations Act 1947, p. 558.

Congress flatly outlawed coercion of employees in the exercise of their rights under the Act and provided that the Act should not grant "immunity" to those who engaged in such coercion.

Congress did not see fit to make any exception to that flat prohibition.

The Board has no authority to write any exception into that flat prohibition, much less one which virtually emasculates the prohibition.

Nor may any court of appeals direct the Board to so exceed its authority.

The Board's authority is limited to the determination of a single question, "Did the discharge interfere with any right guaranteed by the Act?"

It is clear that the Board construes its functions too expansively when it claims general authority to define national labor policy and assumes authority to deter-

mine an individual's qualifications for "future job performance" and whether or not the individual is "unfit for future service."[68]

The Board has a right to interfere with an employer's right to discharge only when that right is used to intimidate or coerce employees in the exercise of their rights under the Act.

As this Court declared soon after the Act was passed, in *N.L.R.B.* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 45-46:

> "The Act does not interfere with the normal exercise of the right of the employer to select its employees or to discharge them. The employer may not, under cover of that right, intimidate or coerce its employees with respect to their self-organization and representation, and, on the other hand, the board is not entitled to make its authority a pretext for interference with the right of discharge when that right of discharge is exercised for other reasons than such intimidation and coercion."[69]

No right is given under the Act to engage in illegal conduct. As this Court held in *N.L.R.B.* v. *Fansteel Metallurgical Corp.*, 306 U.S. 240, 257-258 (a case involving an unfair labor practice strike):

> "There is not a line in the statute to warrant the conclusion that it is any part of the policies of the Act to encourage employees to resort to force and violence in defiance of the law of the land."

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[68] Supp. J.A. 2359, n. 20; Cf. *American Shipbuilding Corp.* v. *N.L.R.B.*, supra, at p. 25.

[69] The Board has here found that the illegal conduct was the real reason for the discharges. 128 NLRB 1102, n. 63; J.A. 65, n. 63.

Congress emphatically concurred with the above ruling of this Court and stated:

> "Under existing principles of law developed by the courts and recently applied by the Board, employees who engage in violence, *mass picketing, unfair labor practices,* contract violations or other improper conduct, or who force the employer to violate the law, do not have any immunity under the act and *are subject to discharge without right of reinstatement.* The right of the employer to discharge an employee for any such reason is *protected in specific terms* in section 10 (c)." (emphasis supplied) *House Conference Report* No. 510 on H.R. 3020, p. 59, Legislative History of the Labor-Management Relations Act 1947, p. 563.

The Board's decision in the instant case is directly contrary to the specific terms of the statute (Sec. 10 (c)), to the rulings of the courts and to the clearly expressed intent of Congress.

The Board has no shadow of authority to write into Section 10 (c) an exception, not made by Congress and to prescribe a policy in direct conflict with that declared by Congress.

E. The Board's Decision Ignores the Rights Granted to Employees by the Act

The basic principle of the Act is the protection of *employees* from restraint or coercion *by anyone* in the exercise of the rights guaranteed to them under the Act. This basic principle of the Act has been completely ignored by the Board. The Board has considered this matter as one merely of union vs. employer, completely ignoring the rights of the *employees* involved.

The Board has overlooked the fact that the illegal conduct of the union and its supporters was directed—not at the employer—but at *employees.* The injury to the employer was to be accomplished only indirectly, through the medium of injury to Company employees.

It was *employees* who suffered the direct impact of the Union's illegal conduct.

It was *employees* who were deprived of an opportunity to earn a lawful livelihood and who lost wages by illegal mass picketing which kept the plant "shut down like a drum".[70]

It was *employees* whose homes were surrounded and whose families were terrorized by disorderly mobs of "as many as 400, 500 or even 700 persons assembled" shouting vile names, insults, derisive epithets and threats.[71]

The employees against whom the Union's illegal coercion was directed had committed no unfair labor practice. They merely sought to exercise the rights expressly guaranteed to them by Section 7 of the Act. Employees who committed no unfair labor practice suffered loss of wages—striking employees who *did* engage in and support unfair labor practices are rewarded by this decision.

To our knowledge this is the first time in history where it has been held that one may be deprived of his legal rights—not because of any dereliction on *his part*—but because of the alleged dereliction of *someone else* for whose activities he had no responsibility and over whose activities he had no direction or control.

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[70] 128 NLRB at 1103; J.A. 65.

[71] 128 NLRB at 1106; J.A. 70.

The illogical and inequitable character of such a holding is emphasized where it is also held that such deprivation may be accomplished—not by legal processes—but by *illegal acts.*

The Board's decision here reverses the doctrine of *respondeat superior* and creates a new and illogical doctrine of *respondeat inferior.*

Furthermore, the Board's decision here reverses, *sub silentio,* its prior decisions on the same question.

In *International Longshoremen's and Warehousemen's Union* (Sunset Line & Twine Co.), 79 NLRB 1487, 1496, n. 6, and again in *United Mine Workers of America* (Blue Ridge Coal Co.), 129 NLRB 146, 176, n. 80, modified in other respects 299 F. 2d 441 (D.C. Cir.), the Board held:

> "Unlawful conduct on the part of the Company, if established, would neither extinguish the right of its employees to be free of union restraint and coercion nor justify the Respondent Union's alleged infringement of that right."

These prior decisions of the Board are manifestly correct. The Board's present reversal of its established position is error.

CONCLUSION

Since the decision of the Board and the lower court herein reverses the long standing construction of the Act and raises important questions of national labor relations policy, we submit that a review by this Court

is warranted and that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18961

KOHLER COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

LOCAL 833, UAW-AFL-CIO, INTERNATIONAL UNION, UNITED AUTOMOBILE, AIRCRAFT & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, INTERVENOR

On petition to review and set aside, and on request for enforcement of, a supplemental order of the National Labor Relations Board on remand.

Decided April 20, 1965

Before Bazelon, Chief Judge, and Edgerton and Wilbur K. Miller, Senior Circuit Judges.

Per Curiam: In a former appeal[1] we enforced in large part a previous Board order, but remanded the case to the Board for further consideration of two questions: whether the strike was an unfair labor practice strike from its inception and whether any of the 77 strikers denied reinstatement by the Board should be reinstated in light of the principles enunciated in *National Labor Relations Board* v. *Thayer Co.*, 213 F. 2d 748 (1st Cir.), cert. denied, 348 U.S. 883 (1954). On remand the Board determined that the strike was an unfair labor practice from its inception, and that 57 of the 74 surviving strikers who had been denied reinstatement should be reinstated. The Kohler Company petitions for review.

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[1] 112 U.S. App. D.C. 107, 300 F. 2d 699, certiorari denied, 370 U.S. 911 (1962).

The Board properly applied the principles announced in our initial decision, and its determinations are supported by substantial evidence on the record viewed as a whole, *Universal Camera Corp.* v. *National Labor Relations Board,* 340 U.S. 474 (1951). The petition for review will be denied, and the Board's supplementary order enforced in full.

So ordered.

Wilbur K. Miller, Senior Circuit Judge, dissents.

APPENDIX B

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Secs. 151, et seq.) are as follows:

Findings and Policies

Sec. 1 . . .

Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.

Rights of Employees

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor

organization as a condition of employment as authorized in section 8 (a) (3).

UNFAIR LABOR PRACTICES

Sec. 8 . . .

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: . . .

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: . . .

PREVENTION OF UNFAIR LABOR PRACTICES

Sec. 10. . . .

(c) . . . No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. . . .

(e) . . . The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. . . .

(Filed April 20, 1965)

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1964.
No. 18,961

KOHLER COMPANY, *Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent,*

LOCAL 833, UAW-AFL-CIO, INTERNATIONAL UNION, UNITED AUTOMOBILE, AIRCRAFT & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, *Intervenor.*

On Petition to Review and Set Aside, and on Request for Enforcement of, a Supplemental Order of the National Labor Relations Board on Remand.

Before: Bazelon, Chief Judge, and Edgerton and Wilbur K. Miller, Senior Circuit Judges.

Judgment

This case came on to be heard on the record from the National Labor Relations Board and on a petition to review and set aside, and a request for enforcement of the supplemental order of the National Labor Relations Board entered after remand, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this court that the petition to set aside the order of the National Labor Relations Board is denied, and the supplementary order of the Board on review herein will be enforced in full.

Pursuant to Rule 38(1) the National Labor Relations Board shall within 10 days hereof serve and file a proposed enforcement decree consistent with the opinion of this court.

Dated: Apr 20 1965 *Per Curiam.*

Senior Circuit Judge Wilbur K. Miller dissents.

(Filed July 8, 1965)

Decree

Before: Bazelon, Chief Judge; Edgerton and Wilbur K. Miller, Senior Circuit Judges.

This cause came on to be heard upon a petition to review and set aside and upon a cross-petition to enforce a supplemental order of the National Labor Relations Board issued against the petitioner on September 29, 1964, after proceedings pursuant to remand. The Court heard argument of respective counsel on April 6, 1965, and has considered the briefs and supplemental record filed in this cause. On April 20, 1965, the Court being fully advised in the premises handed down its opinion denying the petition to review, and granting enforcement of the Board's supplemental order.

On Consideration Whereof, it is ordered, adjudged and decreed by the United States Court of Appeals for the District of Columbia Circuit that the said supplemental order of the National Labor Relations Board in said proceedings be enforced, in full, and that Kohler Co., its officers, agents, successors, and assigns, abide by and perform the directions of the Board in said order contained.

/s/ David L. Bazelon
Chief Judge

/s/ Henry W. Edgerton
Senior Circuit Judge

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Senior Circuit Judge

Dated: Jul 8 1965

Senior Circuit Judge Wilbur K. Miller dissents.

/s/ Wilbur K. Miller

Filed January 26, 1962

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1961

No. 15,961

LOCAL 833, UAW-AFL-CIO, INTERNATIONAL UNION, UNITED AUTOMOBILE, AIRCRAFT & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, *Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent,*
KOHLER COMPANY, *Intervenor.*

No. 16,031

NATIONAL LABOR RELATIONS BOARD, *Petitioner,*

v.

KOHLER COMPANY, *Respondent.*

No. 16,182

KOHLER COMPANY, a Wisconsin Corporation, *Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent.*

On Petitions to Review and Set Aside, and on Petition for Enforcement of, an Order of the National Labor Relations Board.

Before: Wilbur K. Miller, Chief Judge, and Edgerton and Bazelon, Circuit Judges.

Judgment

These case came on to be heard on the record from the National Labor Relations Board and on petitions to review and set aside, and a cross-petition for enforcement of, the order of the National Labor Relations Board herein, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this court that the order of the National Labor Relations Board on review in these cases is hereby affirmed and will be enforced, except as to so much of the order as denies reinstatement to 77 discharged employees, which portion of the order is hereby set aside.

Pursuant to Rule 38(b) of this court the Board shall within 10 days serve upon the respondent and file with this court a proposed enforcement decree consistent with the opinion of this court and with this judgment.

It is FURTHER ORDERED by the court that the proceedings herein are hereby remanded to the Board for further proceedings with respect to the 77 discharged employees in light of the opinion of this court and for modification of its order if necessary.

PER CIRCUIT JUDGE BAZELON.

Dated: January 26, 1962.

Separate dissenting opinion by Chief Judge Wilbur K. Miller.

Decree

Before: Wilbur K. Miller, Chief Judge, and Edgerton and Bazelon, Circuit Judges.

These case came on to be heard on the record from the National Labor Relations Board and on petitions to review and set aside, and a cross-petition for enforcement of, the order of the National Labor Relations Board issued by it on August 26, 1960, against Kohler Company, its officers, agents, successors and assigns. The Court heard argument of respective counsel on September 11, 1961, and has considered the briefs and transcripts of record filed in these proceedings. On January 26, 1962, the Court, being fully advised in the premises, handed down its opinion affirming and enforcing the order of the National Labor Relations Board on review in these cases except as to so much of

the order as denied reinstatement to 77 discharged employees, which portion of the order was set aside. Judgment was entered on the same day remanding the proceedings to the Board for further proceedings with respect to the 77 discharged employees in the light of the Court's opinion and for modification of the Board's order if necessary. Consistent with such opinion and judgment, it is hereby

ORDERED, ADJUDGED AND DECREED by the Court of Appeals for the District of Columbia Circuit that the Respondent, Kohler Co., its officers, agents, successors and assigns shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Local 833, UAW-AFL-CIO, International Union, United Automobile, Aircraft & Agricultural Implement Workers of America, as the exclusive representative of its employees in the unit found to be appropriate, namely,

> All production and maintenance employees of Respondent's Kohler, Wisconsin, plant, including shop office stenographers, American Club employees, all employees described in the October 23, 1950, Supplement "B" of the contract executed on August 31, 1950, between Respondent and the Kohler Workers Association and all employees described in Supplement "F" of the contract, including employees doing experimental work in the development department, but excluding general office and clerical employees, draftsmen, technicians, clerks in the medical department, employees in the employment department, doctors, dentists, nurses, engineers, employees in the chemical and physical laboratory, confidential employees, watchmen, guards, and supervisors as defined in the National Labor Relations Act.

(b) Discouraging membership in Local 833, UAW-AFL-CIO, International Union, United Automobile, Aircraft &

Agricultural Implement Workers of America, or in any other labor organization of its employees, by discriminatorily discharging them or refusing them reemployment or reinstatement on the same basis as other employees, or by discriminating in any other manner in regard to their hire or tenure of employment or any term or condition of employment.

(c) Threatening and promising benefits concerning the handling of grievances by union stewards; soliciting and promising benefits to procure the return to work of strikers; serving eviction notices on striking employees and evicting them from their living quarters or leased premises because they are on strike; engaging in unlawful surveillance.

(d) In any other manner interfering with, restraining, or coercing its employees in the exercise of their right to self-organization, to form labor organizations, to join or assist Local 833, UAW-AFL-CIO, International Union, United Automobile, Aircraft & Agricultural Implement Workers of America, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8 (a) (3) of the National Labor Relations Act, as modified by the Labor Management Reporting and Disclosure Act of 1959, hereinafter called the Act.

2. Take the following affirmative action which the Board has found will effectuate the policies of the Act:

(a) Upon request, bargain collectively with Local 833, UAW-AFL-CIO, International Union, United Automobile, Aircraft & Agricultural Implement Workers of America, as the exclusive representative of all employees in the aforementioned appropriate unit, and, if an understanding

is reached, embody such understanding in a signed agreement.

(b) Upon request, furnish Local 833, UAW-AFL-CIO, International Union, United Automobile, Aircraft & Agricultural Implement Workers of America, with information concerning incentive earnings as requested by it on January 20 and February 6, 1954, respectively.

(c) Upon application, offer to the employees whose names are listed in Appendix A attached hereto (except James Rogers, LaVern H. Kuhlow, Mrs. Lucille M. Strutz, Mrs. Margaret A. Balnaitis, Mrs. Susie Trester, Marion Haas, Yvonne Pantel, Florence Temme, and Arline Wunsch) reemployment on the same basis as accorded the nonstriking shell department employees, i.e., permanent jobs with retroactive seniority to the date of their original hire, and make them whole in accordance with the Board's remedial policies (*Chase National Bank,* 65 NLRB 827; *Crossett Lumber Company,* 8 NLRB 440; *F. W. Woolworth,* 90 NLRB 289) for any loss of earnings which they may suffer by reason of the Respondent's refusal, if any, to reinstate them in the manner provided above and more fully described in the Remedy, by payment to each of them of a sum of money equal to that which he normally would have earned as wages during the period beginning 5 days after the date on which he applies for reinstatement and terminating on the date of the Respondent's offer of reemployment.

(d) Immediately credit Marion Haas, Yvonne Pantel, Florence Temme and Arline Wunsch with full seniority dating back to the date of their original hire.

(e) Upon application, offer Alex Dottei and each other striking employee (except those 77 strikers listed in Appendix C) attached hereto who had not been permanently replaced prior to June 1, 1954, immediate and full reinstatement to his former or substantially equivalent position without prejudice to his seniority or other rights and privileges,

dismissing if necessary any person hired on or after that date. If after such dismissal, there are insufficient positions remaining, those strikers, for whom no employment is immediately available, shall be placed upon a preferential hiring list with priority determined among them by such system of seniority or other nondiscriminatory practice as heretofore has been applied in the conduct of the Respondent's business and thereafter, in accordance with such list, shall be offered reinstatement as positions become available, and before other persons are hired for such work. The Respondent shall also make the foregoing employees whole in accordance with the Board's remedial policies referred to in paragraph (c) above, for any loss of earnings which they may suffer by reason of the Respondent's refusal, if any, to reinstate them in the manner prescribed above, by payment to each of them of a sum of money equal to that which he normally would have earned as wages during the period beginning 5 days after the date on which he applies for reemployment or reinstatement and terminating on the date of the Respondent's offer of employment.*

(f) Offer to each of the employees whose names are listed in Appendix B attached hereto immediate occupancy of his former, or substantially equivalent, living quarters or leased premises on the same terms accorded other employees, and make him whole for any loss he may have suffered by reason of his eviction by payment to him of a sum of money equal to that which he has had to pay as rental for other living quarters or leased premises from the date of his eviction to the date he is offered occupancy in the manner set forth above, plus such additional expenses as he may have incurred during said period as a direct result of his eviction, but less the amount he would normally

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* The foregoing provision shall be without prejudice to the ultimate right to reinstatement of employees who may have been replaced between April 5 and June 1, 1954, in the event the Board, upon remand, determines that the strike was an unfair labor practice strike from its inception.

have paid to Respondent as rent for his living quarters or leased premises during said period.

(g) Preserve and, upon request, make available to the Board or its agents, for examination, and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to determine the reinstatement rights, backpay due, occupancy of living quarters or leased premises, and losses which may have been incurred by the evictions.

(h) Post in its plant at Kohler, Wisconsin, copies of the notice attached hereto marked "Appendix D." Copies of such notice to be furnished by the Regional Director of the National Labor Relations Board (Chicago, Illinois) for the Thirteenth Region, shall, after being duly signed by the Respondent's authorized representative, be posted by the Respondent immediately upon receipt thereof and be maintained by it for a period of 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(i) Notify the said Regional Director in writing, within 10 days from the date of this Decree what steps the Respondent has taken to comply herewith.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that the proceedings herein are hereby remanded to the Board for further proceedings with respect to the 77 discharged employes in light of the opinion of this Court and for modification of its order if necessary.

Judge, United States Court of Appeals for the District of Columbia Circuit

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Judge, United States Court of Appeals for the District of Columbia Circuit

APPENDIX A

Shell Department Employees Discharged
July 1, 1954

Willard A. Braun
James A. Johnson
Mrs. Wilma M. Bonasky
James Rogers
Robert D. Reineking
Donald L. Goetsch
Leonard Schneider
Mrs. Lillian L. Hochrein
William R. Ploetz
Celilia B. Winebrenner
Arthur F. Zillner
Alton J. Klein
Henry C. Hoppert
Bernard B. Novotny
Dennis G. Tetschlag
Viola A. Gilpin
Beatrice I. Gessler
Donald G. Kempers
Emily Oehldrich
Mrs. Leila L. Katte
Elvera A. Konopik
Marilyn G. Schultz
Delores A. Leithner
Kathryn Kleefisch
Yvonne C. Pantel
Edna DeVriend
Virginia Jackson
Marion E. Haas
LaVern H. Kuhlow
Mrs. Alvina Dross
Mrs. Bernice M. Chvarak
Mrs. Susie Trester
Mrs. Marcella G. Markstháler
Mrs. Delores A. Heimer
Mrs. Jeanette A. Zelle
Mrs. Lucille M. Strutz
Mrs. Rosabelle Klinzing
Mrs. Florence A. Temme
Shirely H. Meissner
Mrs. Laura E. Piontkowski
Mrs. Dolly Schimpf
Mrs. Margaret A. Balnaitis
William M. Hinz
Darlene M. Gillingham
Arline Wunsch
Mrs. Norma H. Bohenstengel
Mrs. Inez H. Osthelder
Mrs. Emily M. Leng
Ann I. Leonhard
Walter H. Schmidt
James M. Seubert
Jacob Vander Kuyl
Marjorie Damrow

APPENDIX B

Henry Arnoldi
Carl Faas
Ervin Siech
Peter Gasser
Frank Novak
John Siech
Walter Siech
Gordon Daniels
Lee Blandin
Ove Gjersten

APPENDIX C

Christ Arnold
James E. Bailey
Walter Barchacky
Arthur Bauer
Ethan Berg
John C. Bowser
Leo J. Breirather
Arbor L. Brewer
Roland Buhk
Alvin G. Burkard
Frederick Bryrum
Anthony Champeau
Lyell F. Clark
Lester Damrow
Robert R. Dean
Ervin Eckhardt
Fred Felde, Jr.
Carl Felsinger
Fred Felsinger
Ronald J. Fischer
Ella Frazier
Lloyd Frerichs
Paul A. Gall
Allan J. Graskamp
Elmer H. Gross
Richard J. Gruenke
Rudolph Gunderson
Clarence Hess
Victor Hicks
Eugene M. Hilderbrand
Edward C. Kalupa
Tony J. Kissel
Harvey H. Klabachek
Raymond Klabachek
George Klauser
Egbert H. Kohlhagen
John Konec
Elmer J. Kraemer
Gustave Leibelt
Fred Liebelt
Harold E. Lindemann
Andrew Lofy
Joseph Lorier
Leon B. Losey
Edward McDougal
Bernard Majerus
Gordon Majerus
Frank Makarevicze
Seraphino M. Marchiando
John M. Martin
William Methfessel
Eddie Meyer
Cornelius Munnik
Curtiss R. Nack
John Nisporic
Kenneth C. Nitsche
Francis "Jim" Olin
Elmer A. Oskey
Henry Osterman
Gordon Peryan
Leo J. Prepster
Norbert Renzelman
Paul Riehl
Carl Rothe
Art Russell, Sr.
Ralph Sabish
Gretchen C. Seybold
Roman Slesrick
Earl J. Smith
Ray Stauber
Gilbert A. Stuckmann
Milton G. Tarkowski
Richard F. Verle
Emil W. Wanta
Joseph Westphal
Robert Winkel
Elmer Zittel

APPENDIX D

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A Decree of the United States Court of Appeals enforcing in part an order of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify our employees that:

WE WILL NOT discourage membership in LOCAL 833, UAW-AFL-CIO, INTERNATIONAL UNION, UNITED AUTOMOBILE, AIRCRAFT & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, or in any other labor organization of our employees, by discriminatorily discharging them or refusing them reemployment or reinstatement on the same basis as other employees, or by discriminating in any other manner in regard to their hire or tenure of employment or any term or condition of employment.

WE WILL NOT threaten or promise benefits concerning the handling of grievances by union stewards; solicit or promise benefits to procure the return to work of strikers; serve eviction notices on striking employees or evict them from their living quarters or leased premises because they are on strike; engage in unlawful surveillance.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of their right to self-organization, to form labor organizations, to join or assist said LOCAL 833, or any other labor organization, to bargain collectively through representatives of their own choosing and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as

a condition of employment as authorized by Section 8 (a) (3) of the Act, as modified by the Labor Management Reporting and Disclosure Act of 1959.

WE WILL offer to the following employees:

Willard A. Braun	Donald L. Goetsch
James A. Johnson	Leonard Schneider
Mrs. Wilma M. Bonasky	Mrs. Lillian L. Hochrein
Robert D. Reineking	William R. Ploetz
Celilia B. Winebrenner	Mrs. Laura E. Piontkowski
Arthur F. Zillner	Mrs. Dolly Schimpf
Alton J. Klein	William M. Hinz
Henry C. Hoppert	Darlene M. Gillingham
Bernard B. Novotny	Mrs. Norma H. Bohenstengel
Dennis G. Tetschlag	Mrs. Inez H. Osthelder
Viola A. Gilpin	Donald G. Kempers
Beatrice I. Gessler	Emily Oehldrich
Kathryn Kleefisch	Mrs. Leila A. Katte
Edna DeVriend	Elvera A. Konopik
Virginia Jackson	Marilyn G. Schultz
Mrs. Alvina Dross	Delores A. Leithner
Mrs. Bernice M. Chvarak	Mrs. Emily M. Leng
Mrs. Marcella G. Marksthaler	Ann I. Leonhard
Mrs. Delores A. Heimer	Walter H. Schmidt
Mrs. Jeanette A. Zelle	James M. Seubert
Mrs. Rosabelle Klinzing	Jacob Vander Kuyl
Shirley H. Messner	Marjorie Damrow

reemployment on the same basis as accorded the nonstriking shell department employees, i.e., permanent jobs with retroactive seniority to the date of their original hire, and make them whole for any loss of earnings which they may suffer by reason of our refusal, if any, to reinstate them in the manner provided above and more fully described in the Remedy section of the Board's Decision and Order, by payment to each of them of a sum of money equal to that which he normally would have earned as wages during the period beginning 5 days after the date on which he applies for reinstatement and terminating on the date of our offer of reemployment.

WE WILL immediately credit employees Marion Haas, Yvonne Pantel, Florence Temme, and Arline Wunsch with full seniority dating back to the date of their original hire.

WE WILL, upon application, offer Alex Dottei and each striking employee (except those 77 strikers as to whom the Board has dismissed the complaint) who had not been permanently replaced prior to June 1, 1954, immediate and full reinstatement to his former or substantially equivalent position without prejudice to his seniority or other rights and privileges, dismissing, if necessary, any person hired on or after that date. If after such dismissal, there are insufficient positions remaining, those strikers, for whom no employment is immediately available, shall be placed upon a preferential hiring list with priority determined among them by such system of seniority or other nondiscriminatory practice as heretofore has been applied in the conduct of the Respondent's business and thereafter, in accordance with such list, shall be offered reinstatement as positions become available, and before other persons are hired for such work. We will also make the foregoing employees whole for any loss of earnings which they may suffer by reason of our refusal, if any, to reinstate them in the manner described above, by payment to each of them of a sum of money equal to that which he normally would have earned as wages during the period beginning 5 days after the date on which he applies for reinstatement or reemployment and terminating on the date of our offer of employment.

WE WILL offer to Henry Arnoldi, Carl Faas, Ervin Siech, Peter Gasser, Frank Novak, John Siech, Walter Siech, Gordon Daniels, Lee Blandin, and Ove Gjersten immediate occupancy of his former, or substantially equivalent, living quarters or leased premises on the

same terms accorded other employees, and make him whole for any loss he may have suffered by reason of his eviction by payment to him of a sum of money equal to that which he has had to pay as rental for other living quarters or leased premises from the date of his eviction to the date he is offered occupancy in the manner set forth above, plus such additional expenses as he may have incurred during said period as a direct result of his eviction, but less the amount he would normally have paid to us as rent for his living quarters or leased premises during said period.

WE WILL, upon request, furnish said Local 833 with information concerning incentive earnings as requested by it on January 20 and February 6, 1954, respectively.

WE WILL, upon request, bargain collectively with said Local 833 as the exclusive representative of all our employees in the bargaining unit described below with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

> All production and maintenance employees of our Kohler, Wisconsin, plant, including shop office stenographers, American Club employees, all employees described in the October 23, 1950, Supplement "B" of the contract executed on August 31, 1950, between us and the Kohler Workers Association and all employees described in Supplement "F" of the contract, including employees doing experimental work in the development department, but excluding general office and clerical employees, draftsmen, technicians, clerks in the medical department, employees in the employment department, doctors, dentists, nurses, engineers, employees in the chemical

and physical laboratory, confidential employees, watchmen, guards, and supervisors as defined in the Act.

KOHLER CO.
(Employer)

Dated ..... By .....
(Representative) (Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.